IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 30, 2007

# STATE OF TENNESSEE v. SCOTT G. CLEVENGER

**Appeal from the Circuit Court for Grainger County**
**No. 4190 O. Duane Slone, Judge**

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**No. E2007-00298-CCA-R3-CD - Filed March 5, 2008**

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The Appellant, Scott G. Clevenger, was convicted by a Grainger County jury of one count of aggravated sexual battery, one count of rape of a child, and two counts of incest. He was subsequently sentenced to consecutive sentences of nine years for aggravated sexual battery, twenty-five years for rape of a child, six years for one count of incest, and ten years for the second count of incest, resulting in an effective sentence of fifty years. On appeal, Clevenger raises the single issue of "whether the statements by the [Appellant] should be suppressed because the [Appellant] did not knowingly waive his rights as required under *Miranda* prior to interrogation." Because the record reveals that no motion for new trial was filed in this case, the issue is waived. *See* Tenn. R. App. P. 3(e). Moreover, we conclude that the issue does not rise to the level of plain error. Accordingly, the appeal is dismissed.

**Tenn. R. App. P. 3; Appeal Dismissed**

DAVID G. HAYES, J., delivered the opinion of the court, in which DAVID H. WELLES and D. KELLY THOMAS, JR., JJ., joined.

James Lee Deaton, Assistant Public Defender, Dandridge, Tennessee, for the Appellant, Scott Clevenger.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Elaine Wilber, Assistant Attorney General; and Tonya D. Keith, Assistant District Attorney General, for the Appellee, State of Tennessee.

## OPINION

### Factual Background

The victim, K.G., is the stepdaughter of the Appellant, and the victim, S.C., is the Appellant's daughter.[1] On February 25, 2006, seventeen-year-old K.G. confided in her sister S.C., who was fifteen, that the Appellant had reinitiated sexual contact with her after believing that the ongoing molestation had ended. The following day, the victims reported the incident to the Grainger County Sheriff's Department and informed officers that the Appellant had been sexually abusing both of them over a period of years. After the two victims were interviewed by Department of Children's Services ("DCS") investigators, the Appellant was interviewed by Officer Maness of the sheriff's department. Maness orally advised the Appellant of his rights, including the right to remain silent and the right to an attorney, before questioning the Appellant. Although the Appellant initially denied any wrongdoing, he eventually gave four written statements during the course of the interview, admitting sexual penetration and contact with both victims. According to Maness, the Appellant was, prior to the giving of each of the four statements, read his rights. Each statement was signed by the Appellant and included a separate signed acknowledgment, also signed by the Appellant, waiving his Fifth Amendment rights. The four signed statements by the Appellant, with accompanying signed waiver of rights forms, were introduced as exhibits at the hearing.

Following his indictment on August 15, 2006, by a Grainger County grand jury for one count of aggravated sexual battery involving the victim K.G., one count of rape of a child involving the victim S.C., and two counts of incest, one of K.G. and one of S.C., the Appellant filed a motion to suppress his statements to Officer Maness.[2] A hearing on the motion was held on December 6, 2006, immediately prior to commencement of the trial. At the hearing, the Appellant testified that he did not recall being informed of his *Miranda* rights. He acknowledged that he "signed some papers after the questioning," but he claimed that he did not recall what the papers were. Moreover, he insisted that he signed the papers after he had given his statements to police. However, Officer Maness testified that he informed the Appellant of his rights "each time before he gave [the four] statements." Additionally, he stated that he had specifically asked the Appellant each time if he understood his rights and, further, reminded the Appellant of his rights following each break that was taken during the questioning.

Tape recordings of the interview with the Appellant were admitted into evidence at the hearing as well. No indication of *Miranda* warnings was audible on the tape, with the only mention of the rights being "at the beginning of one . . . tape, [the Appellant] was advised that he had been read his rights." When asked why the warning as given did not appear on the tapes, Maness stated that he did not know "whether [the rights portion of the interview] were taped or not." The trial court, after hearing the testimony presented, accredited the testimony of Officer Maness and denied the Appellant's motion to suppress, finding that the Appellant had knowingly and voluntarily waived his constitutional rights as provided by *Miranda*.

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[1] In order to protect the identity of minor victims of sexual abuse, it is the policy of this court not to refer to them by name. *State v. Schimpf*, 782 S.W.2d 186, 188 n.1 (Tenn. Crim. App. 1989).

[2] The aggravated sexual battery count alleged the date of 1998; the rape of a child count alleged the date of 2002; the count of incest, involving the victim S.C., alleged the date of 2004; and the count of incest, involving the victim K.G., alleged the date of February 25, 2006.

At trial, S.C. testified that she had been sexually molested and raped by the Appellant and that the incidents had began when she was six years old. The first incident involved her father forcing her and her stepsister, K.G., to "perform oral sex on him, and he was touching us in places like down below . . . ." She also testified regarding a 2002 incident, when she was twelve years old, during which the Appellant took her into his bedroom, "and he penetrated me that night . . . and he performed oral sex [on her] . . . [and] made her" perform oral sex on him. S.C. also testified to a specific incident occurring in 2004, during which the Appellant had her "on the couch and he was trying to do things with [her]. Once again it was oral, and then he tried to stick his penis in [her] vagina and it hurt . . . and he quit."

K.G. also testified at trial that she had been sexually molested and raped by the Appellant, stating the abuse began when she was nine years old with an incident involving both her and S.C. during which the Appellant fondled her, touched her, and made her perform oral sex on the Appellant. She stated that the abuse continued until 2006, with the final incident occurring on February 25. According to K.G., she was lying on a futon with her eyes closed. She assumed the Appellant thought her to be asleep. According to K.G., the Appellant was "sticking his fingers in me and everything, and then oral sex again."

At trial, Officer Maness read the Appellant's four statements into the record. The Appellant testified and denied that any of the incidents had occurred. He testified that he only gave the statements to police after he was questioned for four and a half hours and that he signed the statements because he "was scared mostly . . . and didn't want to see my girls hurt or go through any pain or suffering." According to the Appellant, he informed the officers that he had problems with his memory due to heavy drug usage, and they gave him "hints" and convinced him that the incidents had occurred.

After hearing the evidence presented, the jury convicted the Appellant as charged. Following a sentencing hearing, the court imposed an effective sentence of fifty years for the Appellant's Class A, B, and C felony convictions. Additionally, the court ordered that this fifty-year sentence be served consecutively to a six-year community corrections sentence which was revoked based upon these convictions. The record before us indicates that no motion for new trial was filed in the case. On February 8, 2007, the Appellant filed a notice of appeal and, on February 9, an amended notice of appeal was filed.

**Analysis**

On appeal, the Appellant raises the single issue of "whether the statements by the [Appellant] should be suppressed because the [Appellant] did not knowingly waive his rights under *Miranda* prior to interrogation." In response, the State argues that the Appellant has waived consideration of this issue by his failure to file a motion for new trial in the case.

Tennessee Rule of Appellate Procedure 3(e) states, in pertinent part, that "in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion

of evidence . . . unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived." This court has held that the waiver provision of Rule 3(e) results in waiver of all issue which, if found to be meritorious, would result only in the granting of a new trial. *State v. Keel*, 882 S.W.2d. 410, 416 (Tenn. Crim. App. 1994). However, the waiver provision does not apply when the issue, if found to be meritorious, would result in the dismissal of the prosecution against the accused. *Id*.

"Failure to file a written motion for new trial within the required thirty days not only results in [an] appellant losing the right to have a hearing on the motion, but it also deprives [an] appellant of the opportunity to argue on appeal any issues that were or should have been presented in the motion for new trial." *State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997). The thirty-day provision is jurisdictional, and this court does not have the authority to waive the untimely filing of a motion for new trial. Tenn. R. App. P. 4(a); *see also State v. Givhan*, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1980).

Review of the record before us fails to indicate that a motion for new trial was ever filed in this case or heard by the trial court.[3] Moreover, after review, it is clear that the issue raised by the Appellant, if found to be meritorious, would not result in dismissal of the prosecution because the proof contains additional evidence to support the convictions. As such, the waiver provisions of Rule 3(e) are applicable to this case. Thus, we agree with the State that the Appellant has procedurally waived review of the issue by his failure to file a motion for new trial.

Because the issue is waived, it is reviewable only under the discretionary authority of plain error. Tenn. R. Crim. P. 52(b). Rule 52(b) provides, "[a]n error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." In *State v. Adkisson*, this court established five factors to be applied in determining whether an error is plain: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused [must not have waived] the issue for tactical reasons; and (e) consideration of the error must be "necessary to do substantial justice." 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994) (citing Tenn. R. Crim. P. 52(b)). The record must support the presence of all five factors; the absence of only one factor precludes further consideration. *State v. Smith*, 24 S.W.3d 274, 283 (Tenn. 2000). We would further note that "rarely will plain error review extend to an evidentiary issue." *State v. Ricky E. Scoville*, No. M2006-01684-CCA-R3-CD (Tenn. Crim. App. at Nashville, Sept. 11, 2007); *see also State v. Billy Harris*, No. W2003-01911-CCA-R3-CD (Tenn. Crim. App. at Jackson, Aug. 4, 2004).

[3] We would note that the Appellant has included in his initial and amended "notice of appeal" documents the issue which he now raises in this appeal. This practice is not a proper substitute for the filing of a motion for new trial, particularly under those circumstances where the motion was never ruled upon by the trial court. *See* Tenn. R. Crim. P. 33.

After review, we have determined that this issue does not invite plain error review. *See Adkisson*, 899 S.W.2d at 638. The record in this case does not support the conclusion that "a clear and unequivocal rule of law . . . [has] been breached." The trial court, accrediting the testimony of Officer Maness, found that the Appellant had knowingly and voluntarily waived his *Miranda* rights. This finding is supported by the record, which includes four signed waivers of rights by the Appellant. All the evidence before the court supports the trial court's finding that the Appellant knowingly, intelligently, and voluntarily waived his rights; thus, no clear rule of law has been breached. Because the issue does not rise to the level of plain error review, the issue raised by the Appellant on appeal is deemed waived. As such, the appeal is dismissed.

**CONCLUSION**

Based upon the foregoing, the Appellant's issue is waived, and the appeal is dismissed.

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DAVID G. HAYES, JUDGE